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ALEXANDER L. STEVAS,
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No. 83-2142

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DAVID KAPLAN,

Petitioner,

– against –

CATHERINE J. RUGGIERI, MARGARET S. MACNAMARA, THEODORE MUZIO, GERARD T. O'BOYLE, MELVIN MARTIN, MARGUERITE A. DONNELLY, ROBERT M. HENDRICK, EARL R. WOODS, PAUL S. SZABO, JOHN C. ALEXION, C. CARL ROBUSTO; ST. VINCENT'S COLLEGE, A UNIT OF ST. JOHN'S UNIVERSITY; ST. JOHN'S UNIVERSITY; FREDERICK E. HUEPPE AND EDWARD J. MIRANDA, AS CO-PRESIDENTS OF ST. JOHN'S CHAPTER OF THE A.A.U.P.-F.A. AT ST. JOHN'S UNIVERSITY (an independent labor union)

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

NON-UNION RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the District Court abused its discretion by refusing to allow an amendment to a complaint, where summary judgment had previously been granted to Defendants "in all respects;" the Court of Appeals affirmed the granting of defendants' motion for summary judgment, and no petition for certiorari was sought?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iii
Statement of the Case	1
Argument	2
THE DETERMINATION THAT PETITIONER SHOULD NOT BE GRANTED LEAVE TO AMEND HIS COMPLAINT WAS, IN ALL RESPECTS, CORRECT	
Conclusion	6

TABLE OF AUTHORITIES

Cases	Page
Commissioner v. Sunnen, 333 U.S. 591 (1948) ...	4
Cromwell v. County of Sac, 94 U.S. 351 (1876) ..	3, 4
DelCostello v. IBT, _____U.S._____, 103 S. Ct. 2281 (1983)	5
Delaware State College v. Ricks, 449 U.S. 250 (1980)	5
Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981)	4
Foman v. Davis, 371 U.S. 178 (1962)	3
Kaplan v. Long Island University, 85 Lab. Cas. (CCH) ¶10,942 (S.D.N.Y. 1978)	1
Nevada v. United States, _____U.S._____, 103 S. Ct. 2906 (1983)	4
United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981)	5
Statutes	
Labor-Management Relations Act of 1947, §301, 29 U.S.C. §185 (1976)	1, 2, 5
Other Authorities	
Moore's Federal Practice (2d ed. 1983)	2, 3
Restatement (Second) Judgments (1982)	2
Wright, Miller & Kane, *Federal Practice and Procedure* (2d ed. 1983)	2

STATEMENT OF THE CASE

Petitioner is an attorney who was a professor of business law at St. Vincent's College which is a unit of Respondent, St. John's University [6-7].* Prior to his employment at Respondent University, Petitioner's employment had been terminated by Long Island University. [*See, Kaplan v. Long Island University*, 85 Lab. Cas. (CCH) ¶10,942 (S.D.N.Y. 1978)]. In the fall of 1980, Petitioner's application for tenure at Respondent University was denied [22a-23a].

The Non-Union Respondents comprise the University, St. Vincent's College and various faculty members and administrators at the University, the majority of whom served on the two committees (comprised almost exclusively of Petitioner's faculty peers) which denied Petitioner tenure [22a-24a].

The remaining Respondents, who are separately represented, are the faculty Union and its co-presidents [21a].**

Petitioner brought an action in the United States District Court for the Eastern District of New York, challenging, *inter alia*, the denial of tenure to him (which he labelled a "wrongful discharge") and breach of the Union's duty of fair representation ["*Kaplan I*"; 20a-22a]. Jurisdiction was based primarily upon §301 of the Labor-Management Relations Act of 1947, 29 U.S.C. §185 (1976) [20a]. There was no claim of violation of Title VII or any other civil rights law.

In *Kaplan I*, Respondents moved for summary judgment with regard to all of the claims set forth in Petitioner's original complaint other than a pendent defamation claim. Those motions for summary judgment were "granted in all respects" [36a]. Petitioner then appealed to the Second Circuit which unanimously affirmed, *inter alia*, "for the reasons stated in Judge Neaher's thorough opinion" [14a]. Petitioner then unsuccessfully sought a rehearing en banc [17a-18a]. *No petition for certiorari was sought by Petitioner in Kaplan I.*

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*Unless otherwise indicated, all references are to the Petition for Certiorari and references with a suffix "a" are to the appendix thereto.

**We have been informed that although the Union Respondents oppose the Petition, they do not intend to file a brief.

Thereafter, Petitioner moved to amend his complaint ["*Kaplan II*"; 7a]. Jurisdiction continued to be based on §301 [41a]. The District Court found the gravamen of the complaint in *Kaplan I* and the proposed amended complaint in *Kaplan II* to be the same [12a n.2]. Indeed, as is made manifest by the Petition, the principal addition to the proposed amended complaint in *Kaplan II* was a reshuffling of assertions Petitioner had previously made in an affidavit submitted by him in *Kaplan I*, regarding payments of $150 to the Union [*See e.g.*, 6 n.3, 20, 23, 26].

Accordingly, the District Court denied Petitioner's motion to amend primarily on the grounds of *res judicata* [8a-11a] and the Court of Appeals for the Second Circuit affirmed "substantially for the reasons set forth in the memorandum and order" by the District Court [2a]. It is from this decision in *Kaplan II* that Petitioner now seeks review by this Court.

ARGUMENT

THE DETERMINATION THAT PETITIONER SHOULD NOT BE GRANTED LEAVE TO AMEND HIS COMPLAINT WAS, IN ALL RESPECTS, CORRECT

As the Petition recognizes, summary judgment was granted in *Kaplan I* despite numerous assertions by Petitioner of his payments to the Union of $150 and his claim of "wrongful discharge" [*e.g.*, 6 n.3, 20-21, 23, 25-26]. Indeed, it is crystal clear from the Petition itself that, under the guise of petitioning for certiorari in *Kaplan II*, Petitioner's real attack is upon the grant of summary judgment in *Kaplan I* [6-11(4); 19-27].

It is hornbook law that:

> A summary judgment motion goes to the merits of the case, and because it does not simply raise a matter in abatement, a granted motion operates to merge or bar the cause of action for purposes of res judicata.

10 Wright, Miller & Kane, *Federal Practice and Procedure, Civil 2d*: §2712, at 584-85 (2d ed. 1983) (footnotes omitted); 6 *Moore's Federal Practice*, §56.03, at ¶56-55 (2d ed. 1983); Restatement (Second) Judgments, §19, comment g (1982).

The District Court recognized these elemental principles and held [8a; 574 F. Supp. at 633]:

> The original complaint included a claim that the union breached its duty of fair representation as a result of its handling of the grievance proceeding. Fed. R. Civ. P. 56 indicates that a "motion for summary judgment applies to the merits of a claim", *Heyward v. Public Housing Administration*, 238 F.2d 689 (5th Cir. 1956), "and if [granted] in favor of the defendant the judgment is in bar." 6 Moore's Federal Practice §56.03 at p. 56-55 (2d ed. 1983). Therefore, plaintiff's general claim of unfair representation has been adjudicated on the merits.[*]

Over a century ago, this Court, in *Cromwell v. County of Sac*, 94 U.S. 351 (1876), explained the doctrine of *res judicata* as follows [at 352]:

> [T]he judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

See also, 6 *Moore's Federal Practice*, 56.17 [52] at 56-1043 and n.1 (2d ed. 1983).

The District Court held that all of the issues sought to be raised by Petitioner in *Kaplan II* were (or, at the very least, might have

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*Thus, Petitioner's reliance upon *Foman v. Davis*, 371 U.S. 178 (1962) is flawed in two respects. First, as the District Court noted in a footnote to its opinion [12a; 574 F. Supp. at 634 n.3]:

> *Foman* allowed an amendment which stated an alternative theory of recovery. Here plaintiff does not interpose an alternative theory of recovery but rather attempts to buttress the existing one, which has already been adjudicated.

Second, unlike *Foman*, Petitioner herein has been fully "afforded an opportunity to test his claim on the merits." [*Foman*, at 182].

been) litigated on the merits in *Kaplan I*. It stated [8a-10a; 574 F. Supp. at 633-34]:

> The doctrine of res judicata applies to prevent a cause of action from being relitigated between identical parties. When a judgment has been entered on the merits it is final as to the claim in controversy. That finality applies " 'not only as to every matter which was offered and received to sustain or defeat the claim or demand but as to any other admissible matter which *might have been offered* for that purpose.' " *Nevada v. United States*, _____U.S._____, _____, 103 S. Ct. 2906, 2918, 77 L. Ed. 2d 509 (1983) (emphasis added), *quoting Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 L. Ed. 195 (1876). In other words, the final judgment puts an end to the cause of action. *Commissioner v. Sunnen*, 333 U.S. 591, 597, 68 S. Ct. 715, 719, 92 L. Ed. 898 (1948).
>
> * * *
>
> Here, plaintiff's claim certainly "might have been offered" before. His claim concerning the extracting of money by the union is inextricably linked to the claim of unfair representation; it is not an additional fact that has subsequently occurred but one which plaintiff was capable of pleading when the original complaint was filed. Plaintiff did not bring this fact up then and is precluded from asserting it now. [Footnote omitted].

The District Court's holding that Petitioner's proposed amended complaint was barred by the doctrine of *res judicata* is in conformity with the uniform decisions of this Court which precludes a collateral attack upon the final judgment granted in *Kaplan I*. *Federated Dep't. Stores, Inc. v. Moitie*, 452 U.S. 394, 398-99 (1981); *Nevada v. United States*, _____U.S._____, 103 S. Ct. 2906 (1983); *Commissioner v. Sunnen*, 333 U.S. 592 (1948); *Cromwell v. County of Sac*, 94 U.S. 351 (1876).

Moreover, there are no less than three additional bases for rejecting the proposed amended complaint.

First: In *Kaplan I* both the District Court [34a-35a] and the Court of Appeals [15a] held that Petitioner's tenure decision was, in the words of the Court of Appeals, "decided despite the union's action and/or inaction in handling the matter" [*id.*]. Accordingly, any payment of $150 to the Union is irrelevant to Petitioner's denial of tenure ("wrongful discharge") claim.

Second: This Court has held that in order for an employee to sustain a §301 action, he must prove two " 'inextricably interdependent' " elements *viz.*: "breach of the collective bargaining agreement" by the employer and a "breach of the union's duty of fair representation." *DelCostello v. IBT*, _____U.S._____, 103 S. Ct. 2281, 2290 (1983). Since, as noted in the preceding paragraph, in *Kaplan I* both the District Court and the Court of Appeals found no violation of §301 in connection with the denial of tenure ("wrongful discharge"), the essential element of the employer's breach is absent, and the §301 action must fail.*

Third: Assuming, *arguendo*, that Petitioner has alleged a "new claim" involving the Union's duty of fair representation, it is barred by the statute of limitations. The proposed amended complaint is dated May 10, 1983 [85a]. Whether Petitioner's claim ran from the denial of tenure, which occurred on October 24, 1980 [22a; *see Delaware State College v. Ricks*, 449 U.S. 250 (1980)], or even from the date Petitioner filed his original complaint (June 25, 1981), it is clearly beyond the six month statute of limitations. *See DelCostello v. IBT*, *supra*.

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*Accordingly, Petitioner's reliance upon *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981) is misplaced. Nowhere in the *Mitchell* case does this Court infer that an independent action for breach of a union's duty of fair representation may be brought under §301. That section, by its terms, relates only to "[s]uits for violation of contracts between an employer and a labor organization . . . or between any such labor organizations . . . ." 29 U.S.C. §185(a). In any event, the holding in *Mitchell* was superseded by this Court in *DelCostello*, 103 S. Ct. at 2291.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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